Custom Cut, Inc. *and* Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America. Case 28–CA–18062

September 11, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On March 5, 2003, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions, a supporting brief and a reply brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Custom Cut, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a):

"(a) Within 14 days after service by the Region, post at its facilities in Las Vegas, Nevada, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 2002.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 11, 2003

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discourage you from discussing your wages among yourselves or tell you WE WILL NOT discuss wages with you.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CUSTOM CUT, INC.

[1] Contrary to the judge's statement in his decision, the resume of employee Edward Jin was submitted into evidence. Correction of this misstatement is insufficient to affect our findings in this case.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] There are no exceptions to the judge's findings that the Respondent interfered with employees' Sec. 7 rights and violated Sec. 8(a)(1) by "telling employees that it would not discuss wages during their first 90 days, after which their work would be reviewed" and by "discouraging employees from discussing wages among themselves."

[4] We shall modify the judge's recommended Order in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997). In addition, we shall substitute a new notice to conform to *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

Nathan W. Albright, Esq., for the General Counsel.
Noel E. Eidsmore, Esq., of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Las Vegas, Nevada, on January 7, 2003, on the General Counsel's complaint which alleged that the Respondent committed certain violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. by various acts including its refusal to reemploy Edward Jin and Joe Milli since May 14, 2002.[1]

The Respondent generally denied that it committed any violations of the Act and through the testimony of its president, contends that it had no work available for which Jin was qualified and that based on Milli's previous employment, he concluded Milli would not be satisfied with the hourly wage rate offered to employees in their first 90 days.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a Nevada corporation engaged in the construction industry at various locations throughout the United States including jobsites in Las Vegas, Nevada. In the course and conduct of this business, the Respondent annually purchases and receives at its Las Vegas jobsites goods, products, and materials directly from points outside the State of Nevada valued in excess of $50,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent stipulated, and I find, that Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Respondent's business consists of installing fixtures and millwork packages for retail stores. The Respondent generally has six to eight employees, exclusive of managers and supervisors, most of whom are what its owner and president, Roman Jaworsky, refers to as "high end carpenters." The Respondent also employs laborers and occasionally carpenters who would not qualify as "high end." While the Respondent's home is Las Vegas, it has work throughout the United States. Indeed, Donna Ferrara, its project manager lives near Detroit, Michigan, and commutes to jobsites throughout the United States. Ferrara testified that for many jobs, the Respondent relies on subcontractors rather than employees. Managers include, in addition to Jaworsky and Ferrara, Javier Escobar, vice president of operations, Marco Escobar, an onsite supervisor, and John Nalencz, a carpenter supervisor.

Edward Jin testified that he answered the Respondent's ad for carpenters by sending his resume (not in evidence) and was subsequently interviewed by Javier Escobar, with Marco being present along with an office employee. During the course of the interview, Jin said "that I was in the Union, and I was a current member of the Union, and that, mainly, my work was finish work." He testified that they seemed pleased and he was hired, and he began work on March 8.

Joe Milli testified that he heard that the Respondent was hiring carpenters and, he therefore, faxed his resume on March 17, was interviewed by Jaworsky on March 21, and went to work on March 25 as a finish carpenter. On his resume Milli wrote that he was a "Union carpenter" from "1997–pres." He testified that Jaworsky asked if he was in the Union and his out-of-work number. Jaworsky told Milli that the Respondent was nonunion. Milli was hired at the rate of $15 per hour, though he asked for $18. Milli told Jaworsky that if a better paying union job became available, he would have to quit. Jaworsky said he understood.

Jin went to work on a project in Beverly Hills, California. Milli reported to the GAP job in Las Vegas. After the Beverly Hills project was completed, Jin was also assigned to the GAP job. Both were laid off on May 1 when the GAP project was completed. Jin testified that he filed a grievance (presumably with the Union) because "we got laid off for no reason." Juan Carlos Leyva, the Union's organizer and business agent, testified that he told them to write out statements "before we filed official charges." These statements do not exist and the only evidence of "official charges" is the Board charge in this matter filed on July 17.

In any event, in mid-May Jin noticed an ad for finish carpenters which gave the Respondent's telephone number. He contacted Milli and they went to the Respondent's office on or about May 14 and talked to Jaworsky about being rehired. He refused to do so and this act is alleged to have violated Section 8(a)(1), (3), and (4).

As amended at the hearing, the complaint also alleges that on March 8 Javier Escobar and on April 3 Marco Escobar "promulgated an overly broad and discriminatory rule prohibiting its employees from discussing their wages with other employees" and that on March 8 and April 3 Javier and Marco, respectively, threatened employees "with discharge and unspecified reprisals because they discussed employee wages with other employees."[2] It is finally alleged that on May 14 Jaworsky "threatened not to rehire its employees because they engaged in union activity and filed a charge with the Board.

B. Analysis and Concluding Findings

1. The refusal to recall Milli and Jin

The union activity which the General Counsel argues was the motivating reason Jaworsky did not recall Milli and Jin consists

[1] All dates are in 2002, unless otherwise indicated.

[2] The General Counsel's amendments also included a new par. 5(d). On brief, counsel for the General Counsel withdrew this allegation for lack of proof.

of their discussing the Union with fellow employees during lunch breaks at the GAP project and giving fellow employees Leyva's business card. While this activity may have been known to Jaworsky via his job supervisor Nalencz, there is simply no direct evidence that such minimal union activity would motivate Jaworsky not to rehire them. Thus, to support finding a violation, antiunion motive would have to be inferred.

Here a critical element on which such an inference could be drawn is missing—that of animus against the Union, which the Board has always required the General Counsel to prove. E.g., *Manno Electric, Inc.*, 321 NLRB 278 fn. 12 (1996). To the contrary, when interviewed both Milli and Jin told the interviewer (Jaworsky in Milli's case, the Escobar's in Jin's) that they were current members of the Union and were out of work. Milli so stated on his resume. Nevertheless they were hired. And Nalencz is a current dues-paying member of the Union. Nor is there evidence that the wages offered by the Respondent were less than those established in the Union's contracts. If the Respondent was really opposed to the Union, it is unlikely that Milli and Jin would have been hired in the first place.

Sometime in April, Leyva twice called Nalencz (on the Respondent's cell phone given to Nalencz) and urged Nalencz, as a union member, to help organize the Respondent's employees. Nalencz declined. This was apparently offered to show company knowledge of organizational activity. I conclude that this proves only that the Leyva contacted Nalencz. It would take a giant step of bgic to further conclude that the Respondent thereby had knowledge that Milli and Jin were engaged in organizational activity. In fact their organizational efforts were at most minimal. Further, Nalencz credibly testified that he did not "frown" on any union activity they may have engaged in, as long as they were "swinging the hammer."

Though the Respondent operates nonunion, it is nevertheless difficult to infer that having hired known union members, Jaworsky would refuse to rehire them because they discussed the Union at lunch breaks. To be sure, there are some inconsistencies between the testimony offered by the Respondent's witnesses and contemporaneous written statements; however, on balance I credit Jaworsky and the Escobars. Their testimony appeared forthright and included statements which seemed to be admissions against the interests of the Respondent, such as Jaworsky asking Milli and Jin whether they had filed charges against him with the Union. Though telling them that he would hire them if work became available, he testified that he did not rehire them because there was no work for Jin's level of competence and he felt that Milli would not be happy with the $15 per hour he was offering.

While Jaworsky had written that both had done "a good job and if something came up, he would give them a call," unquestionably Jin was relatively inexperienced. Whether he in fact had the competence to do "high end" carpentry was not demonstrated. Jaworsky wrote that his work was good, but his Beverly Hills supervisor testified it was "not very good." There is no corroborative evidence of his competence or lack of it. It does appear that Milli did quality work, and witnesses for the Respondent so admit. However, from the first week of his employment, Milli complained about his wage rate, notwithstanding that he had accepted $15 and hour. During his short tenure, Milli told the Respondent's managers that $20 would make him happy, but he would accept $18. On being employed, he (as well as Jin) signed a "Conditions of Employment" form proffered by the Respondent to the effect that he would be serving a 90 probationary period, "After which a performance evaluation will be completed."

I cannot infer, as argued by the General Counsel, that failure to rehire Milli and Jin implies a discriminatory and unlawful motive.

The General Counsel also alleges that the failure to recall Milli and Jin was because they had filed a charge with the Board, and thus, the Respondent violated Section 8(a)(4). The Board charge in this matter was filed on July 17, or about 2 months after Jaworsky declined to rehire them. He did make some comment to them on May 14 that he had received a call from the Union's business agent who said they had filed a grievance against the Respondent, but this was untrue. According to Marco Escobar, when Milli and Jin spoke with Jaworsky on May 14, Jaworsky asked "if they had brought charges against him." They responded that they "knew nothing about it."

Although the fact that Jaworsky asked Milli and Jin if they had brought charges against him is suspicious, they denied they had and in fact had not. There is no evidence of charges with the Union and the Board charge in this matter would not be filed for 2 months. In short, this comment by Jaworsky, I conclude, is insufficient to base a finding that Milli and Jin were not rehired because they engaged in union activity or brought charges before the Board.

Finally, not rehiring Milli and Jin seems entirely consistent with the Respondent's hiring practices. In evidence is a summary document showing the hire and termination dates of employees hired in and after June. The General Counsel argues that these documents prove that work was available and therefore Milli and Jin should have been rehired. However, these and other records also show that employees hired after Milli and Jin were not laid off, which was apparently the basis of Jin's claim that the layoff was for no reason. But the General Counsel pointedly does not contend that the original layoff was discriminatory or in any way unlawful.

In any event, the nine employees hired after June lasted from 2 days to 4 weeks, proving a substantial turnover of employees, the exception being supervisors. There is no evidence that any terminated employee was subsequently rehired. Though known to be members of the Union, Milli and Jin were employed longer than any of those hired in and after June. This fact tends to prove that the Respondent had no animus against them because of their union affiliation.

More questionable is whether it was unlawful for Jaworsky to refuse to rehire Milli because he felt Milli would not be satisfied with $15 per hour. Certainly to question one's wage rate is protected activity. At the heart of "wages, hours and other terms and conditions of employment" is wages. However, whether Milli's complaining was concerted is another matter. There is no evidence it was. His complaints, as far as this record demonstrates, were never on behalf of himself and others. In fact Milli's testimony supports the conclusion that his desire for a higher hourly rate was strictly personal. I believe that

Jaworsky had every reason to conclude that if he rehired Milli, Milli would continue complaining about his wage rate. And refusing to rehire him for this reason was not violative of Section 8(a)(1).

For the above reasons, I conclude that the General Counsel failed to prove that the Respondent's refusal to rehire Milli and Jin was for unlawful reasons in violation of Sections 8(a)(1), (3), or (4) of the Act. Finally, I find nothing in Jaworsyky's statements to Milli and Jin which would amount to a threat violative of Section 8(a)(1).

2. The no-discussion allegations

It is alleged that the Respondent promulgated a rule forbidding employees from discussing wages and threatened discharge and other reprisals should they do so. These allegations are based on the testimony of Jin and admissions by the Respondent. Thus, Jin testified that during his orientation conducted by Javier Escobar, he and another new employee were told of the rules, "that we had to wear CCI shirts, that we couldn't wear any other shirt but a CCI shirt. We were told that we couldn't discuss wages, or that would lead to termination, that they didn't tolerate that." Javier testified that he "told them they pretty much got 90 days, and after that, we would talk to them about it (their wages) again, and prior to that, we weren't going to discuss anything." Jaworsky testified that he has instructed his superintendents and managers not to discuss employees' wages during their 90-day probationary period. After that, Jaworsky would decide what their wage rate would be. And in a position statement counsel for the Respondent states, "CCI has no written policy regarding the discussion of wages between employees. However, some supervisors discourage employees from discussing their salaries to avoid problems between them."

There are two aspects to this nondiscussion matter. First is the Respondent's telling employees that it would not discuss wages during their first 90 days, after which their work would be reviewed. The second, is discouraging employees from discussing wages among themselves. Both, I conclude, interfere with employees' Section 7 rights.

As a general proposition, the Board finds unlawful rules which restrict employees from discussing earnings among themselves. E.g., *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165 (1997). To discourage employees from discussing wages (which the Respondent admits) is tantamount to a rule prohibiting employees from engaging in protected concerted activity. Further, to the extent that the Respondent announced that it would not discuss wages with employees, even in their first 90 days, is similarly violative of Section 8(a)(1).

However, I do not believe that Javier told Jin and the others that to discuss wages would result in immediate termination. In fact, repeatedly Milli complained about the wage rate he agreed to accept, and he was not discharged or disciplined in any way for doing so. Marco testified that Milli asked for a raise four or five times and he told Milli that he did not want to discuss wages during Milli's first 90 days. This exchange, apparently, is the basis of the alleged threat. I conclude that Marco did not threaten Milli.

IV. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Custom Cut, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Telling employees that they should not discuss their wages among themselves and that the Respondent would not discuss wages with them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order.

(b) Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

(c) The allegations of unfair labor practices not found above are dismissed.

Dated, San Francisco, California. March 5, 2003

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage employees from discussing their wages among themselves or tell employees we will not discuss wages with them.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

CUSTOM CUT, INC.